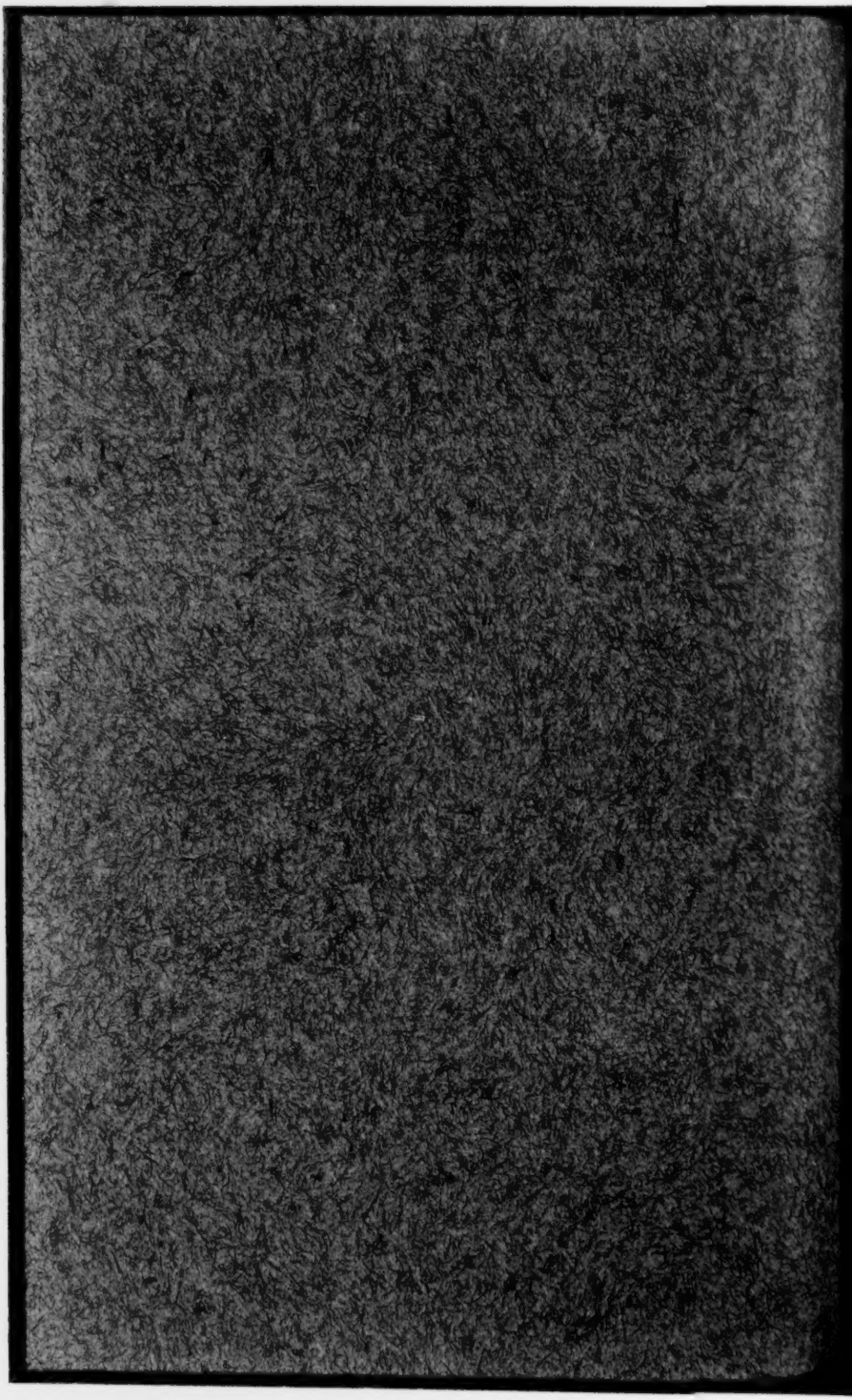
No. 1052

In the Supreme Court of the United States

October Term, 1962

Walt Disney Productions,



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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1021

WALT DISNEY PRODUCTIONS, A CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1377–1392) is reported in 146 F. (2d) 44. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 110–117, 23–67) are reported in 48 N. L. R. B. 892.

JURISDICTION

The decree of the court below (R. 1392–1394) was entered on December 5, 1944. A petition for rehearing filed by petitioner was denied on Jan-

uary 11, 1945 (R. 1395). The petition for a writ of certiorari was filed on March 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether an employee's failure to submit his discriminatory discharge, otherwise constituting an unfair labor practice under Section 8 (3) of the National Labor Relations Act, to arbitration, pursuant to the provisions of a valid collective bargaining agreement, deprives the National Labor Relations Board of jurisdiction to maintain proceedings under the Act to remedy the effects of, and to restrain, such employer misconduct.

2. Whether, in order for the discharge of an employee because of his union activity to violate Section 8 (3) of the Act, it is necessary that the evidence affirmatively show that the discharge had the effect of discouraging union membership.

3. Whether, upon finding that a discriminatorily discharged employee has entered the armed forces of the United States, the Board is required to frame its normal reinstatement order so as to embody therein all of the limitations and conditions as to reinstatement of returning military personnel contained in Section 8 (b) of the Selective Training and Service Act.

STATUTES INVOLVED

The statutes involved are provisions of the National Labor Relations Act and the Selective Training and Service Act, which are set forth in Appendices A and B, *infra*.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on March 31, 1943, issued its findings of fact, conclusions of law, and order (R. 110–117, 26–67). Insofar as here pertinent, the Board found that petitioner, a California corporation, discharged an employee, named Arthur Babbitt, because of his militant membership and activities on behalf of Screen Cartoonists Local 852, affiliated with Brotherhood of Painters, Decorators and Paper Hangers of America, affiliated with the American Federation of Labor (hereinafter called the Union), thereby engaging in an unfair labor practice within the meaning of Section 8 (3) of the Act. This finding was based upon the following underlying facts found by the Board.[1]

Babbitt was one of the ablest and highest paid animators in the animated cartoon motion picture

[1] Petitioner asserts in substance (Pet. 3 n.) that, although it disagrees with the Board's underlying findings, it does not claim that they are not supported by substantial evidence, because "it recognizes that * * * this is not the type of issue this Court will consider." Accordingly, we refer in the Statement only to the pertinent Board findings and do not refer to the evidentiary support.

industry (R. 30–35). He was intensely interested in union organization. Petitioner violently and outspokenly opposed dealing with unions, especially resented Babbitt's militancy when the Union began to organize the studio, and warned him to "cut it out" or he would be discharged. Babbitt nevertheless persisted (R. 35–42). In May 1941, when Babbitt was chairman of the Union, a strike was called under his leadership, principally because of petitioner's refusal to discuss a lay-off program with the organization. The day before the strike began Babbitt was discharged for the first time (R. 42–43).[2] The strike succeeded; the dispute was submitted to arbitration; and the Union entered into a closed-shop contract with petitioner. The arbitrators took cognizance in their award of petitioner's resentment toward Babbitt by making a special provision for his reinstatement and against his discharge in connection with reorganization, except for cause (R. 43–45). Their award also provided a grievance procedure, including arbitration, for settlement of disputes (R. 55, 59–60; see also R. 12–13, Pet. 5). Following conclusion of the strike and Bab-

[2] This discharge is not involved in the case at bar. The reason given Babbitt for the dismissal was that he had "on numerous occasions engaged in union activities of various kinds and descriptions on the company's property and on the company's time" (R. 42). Petitioner had previously freely tolerated such use of its time and property on behalf of an unaffiliated union (R. 35–38, and note 7).

bitt's return to work, petitioner's resentment against him continued. He was given less desirable working quarters, deprived for a time of essential equipment, and denied important or substantial assignments (R. 45–46, 57, 58). Finally, on November 24, 1941, he was included in a mass lay-off of approximately 100 employees. For about 10 days immediately preceding the lay-offs, he had been deliberately assigned no work whatever, so that at the time the lay-offs were effected, he was the only animator in the studio who was unassigned (R. 46, 54, 58). In salary, work rating, and seniority he outranked all those eliminated from petitioner's employ as well as most of those who were retained (R. 30–35, 53–54, 112). The explanations which petitioner advanced to the Board for his inclusion among those laid off were not persuasive as the true ones (R. 47–55, 56–58).

The Union discussed many of the lay-offs with petitioner as grievances under the grievance procedure set up in the arbitrators' award (*supra,* p. 4). It did not present Babbitt's case as a grievance, however, because, according to the arbitrators' award, he was not subject to lay-off, except for cause, and it was considered, accordingly, that his case fell into a category different from that of the other lay-offs (R. 55). Instead, he lodged with the Board an unfair labor practice charge, initiating the case at bar (R. 1–2, 56). Since No-

vember 10, 1942, Babbitt has been on active duty in the United States Marine Corps (R. 114).

Upon the foregoing findings the Board ordered petitioner to cease and desist from its unfair labor practices, to offer Babbitt reinstatement upon application within 40 days after his discharge from the armed forces, to make him whole for net wage losses sustained from the time of the discrimination against him to the date he entered the armed forces, and from a date 5 days after he makes timely application following his discharge from the armed forces to the date of offer of reinstatement, and to post appropriate notices of compliance (R. 114–117).

Thereafter, the Board filed in the court below a petition for enforcement of its order (R. 119–123). Petitioner answered, requesting that the order be set aside (R. 124–132). On December 5, 1944, the court handed down its opinion (R. 1376–1392) and entered its decree (R. 1392–1394), enforcing the Board's order with modifications not here material.

ARGUMENT

1. Petitioner's contention (Pet. 2, 8, 9, 11–12, 14–22) that the grievance and arbitration provision contained in its collective bargaining agreement with the Union operated to deprive the Board of jurisdiction to maintain the proceeding

is refuted by the express terms of the statute. Section 10 (a) of the Act provides that—

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

It is apparent from the face of this provision that Congress intended that the Board should have power to apply the sanctions of the Act to protect the Nation's commerce even though, as here, another "means of adjustment or prevention", established by agreement of the parties, is also available. *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 268 (C. C. A. 3), certiorari denied, 314 U. S. 693;[3] cf., *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 264–269; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435. Contrary to petitioner's contention (Pet. 12, 17), it cannot be assumed that merely because of the existence of its agreement with the Union, no disputes can arise from peti-

[3] Essentially the same contention was made in the employer's petition for certiorari in the *Newark Morning Ledger* case (Pet. 6–7, 9–16, No. 307, October Term, 1941).

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tioner's unfair labor practices which may lead or threaten to lead to obstructions to commerce. See Section 1 of the Act; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S., 1, 42, 43. And nothing in the statute suggests, as petitioner further contends (Pet. 2, 8, 9, 12, 16, 19–21), that the Board's jurisdiction shall apply only after other "means of adjustment or prevention" have been exhausted. On the contrary, the statute unequivocally provides in Section 10 (a) that the Board's power shall not be "affected" by such elements.

Equally untenable is the assumption implicit in petitioner's related contention (Pet. 12, 17–19) that the Board may assert jurisdiction only where "the alleged unfair labor practice interferes so substantially with the public rights created by Section 7 [of the Act] as to require its restraint in the public interest" (Pet. 17–18).[4] Congress did not leave the public interest in these matters an open question; it declared that the public interest was involved in all unfair labor practice cases when it found in Section 1 of the Act that employer interferences with the freedom of employees to organize for collective bargaining lead to labor disputes burdening and obstructing the free flow of commerce. This public interest does

[4] Substantially the same contention was also made in the *Newark Morning Ledger* petition for certiorari (Pet. 7, 24–25, No. 307, October Term, 1941).

not disappear because of the private agreement between petitioner and the Union. The limitation suggested by petitioner is inconsistent, moreover, with the unrestricted grant of power to the Board in Section 10 (a) to prevent "any" person from engaging in "any" unfair labor practice affecting commerce. See also Section 10 (b) of the Act; *Jacobsen* v. *National Labor Relations Board,* 120 F. (2d) 96 (C. C. A. 3).

2. Petitioner contends (Pet. 2, 8, 9, 12–13, 22–26) that in view of its closed-shop agreement with the Union it is "inconceivable" that Babbitt's discharge "could have been made with the *purpose* or especially could in any way have the *effect* of * * * discouraging either Babbit or any other person" from union membership or activities (Pet. 24–25). But the underlying facts found by the Board and reviewed in the Statement (*supra,* pp. 3–5) amply support the Board's conclusion (R. 58–59, 112–113) that Babbitt was included in the list of those dismissed because petitioner resented his leadership in activities on behalf of the Union. Petitioner does not claim that these underlying findings are not supported by substantial evidence; indeed, it expressly disclaims any such challenge (see note 1, p. 3, *supra*). And, as the court below held (R. 1388–1389), the facts that there was a closed-shop agreement in existence and that Babbitt remained a member of the Union despite his discharge did not make the Board's inference (R.

61, 112–114) unreasonable that union membership was discouraged by the discrimination. As the court stated (*ibid.*):

> * * * union membership of groups of employees not covered by the closed-shop contract would be deterred by a show of hostility on the part of the employer. Those employees included in the contract might cease their efforts to obtain its periodic renewals. All employees might deem it wise to forego all active part in union affairs thereby in effect relinquishing their right to membership in a labor union.

The fact that there is no direct evidence in the record "that anyone was discouraged or encouraged in leaving the Union, or any other union, or carrying on any collective bargaining process as a result of Babbitt's layoff" (Pet. 25), does not defeat the Board's finding. It has been the Board's consistent view that a discharge because of union membership and activity necessarily discourages union membership, at least that of the discharged employee, and that therefore such discharge is *ipso facto* a violation of Section 8 (3).

This view has been implicitly upheld by this Court in the many Section 8 (3) cases upon which it has passed, for it has often upheld Board findings of violations of the Section simply upon supported findings of discrimination and without other additional evidence of discouragement of the sort which petitioner here asserts is necessary.

E. g., *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 129; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 255; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177;[5] *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 589, 598, 600, 603.[6] See also S. Rep. No. 573, 74th Cong., 1st sess., p. 11; H. Rep. No. 1147, 74th Cong., 1st sess., p. 19.

Petitioner asserts that in holding that evidence as to the effect of the discharge in discouraging union activities was not necessary, the decision below conflicts with *National Labor Relations*

[5] In the *Phelps Dodge* case, the Court declared that "the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8 (3)" (at p. 187); that "discrimination in hiring [is] an 'unfair labor practice'" (at p. 181); that "it is no longer disputed that workers cannot be dismissed from employment because of their union affiliations" (at p. 183); that "in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act" (at p. 185). The Court recognized that antiunion discrimination inevitably discourages union membership, for it stated (at p. 185): "The effect of such discrimination is not confined to the actual denial of employment; *it inevitably operates against the whole idea of the legitimacy of organization.*" And further (at p. 186), "We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper."

[6] In the *Link-Belt* case, the Court expressly recognized that the discriminatory discharge of a leader in Amalgamated "would tend to have as potent an effect as direct statements to the employees that they could not afford to risk selection of Amalgamated" (311 U. S., at 598).

Board v. *Air Associates, Inc.*, 121 F. 2d 586 (C. C. A. 2), *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240 (C. C. A. 7), certiorari denied, 320 U. S. 746, *Stonewall Cotton Mills* v. *National Labor Relations Board*, 129 F. 2d 629 (C. C. A. 5), certiorari denied, 317 U. S. 667, and *Martel Mills* v. *National Labor Relations Board*, 114 F. 2d 624 (C. C. A. 4). The language of the Fourth Circuit Court of Appeals in the *Martel Mills* case upon which petitioner appears to rely is clearly dictum,[7] and the *Western Cartridge* case, in the Seventh Circuit, squarely holds that "* * * it is not necessary that the coercive conduct had its intended or desired effect * * *" (134 F. 2d, at 244).

Precisely the same claim of conflict with the *Air Associates* case has been presented to this Court in three petitions for certiorari, all of which were denied. *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981 (C. C. A. 7), certiorari denied, 320 U. S. 789; *National Labor Relations Board* v. *Gerity Whitaker Co.*, 137 F. 2d 198 (C. C. A. 6), certiorari denied, 318 U. S. 763; *National Labor Relations Board* v. *Martin Bros. Box Co.*, 130 F. 2d 202 (C. C. A. 7), cer-

[7] "Our conclusion that there is not substantial evidence to support the Board's findings as to discrimination in violation of Section 8 (3) of the Act makes it unnecessary for us to consider the question of whether the alleged discriminations did actually discourage membership in any labor organization" (114 F. 2d, at 633).

tiorari denied, 317 U. S. 660. In each of these cases the Government's brief in opposition also called attention to the *Stonewall* decision of the Fifth Circuit. As was pointed out in these briefs in opposition, the *Air Associates* case was subsequently "very narrowly limited" by the Second Circuit (*National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. 2d 933, 937 (C. C. A. 2)), and the peculiar circumstances of that case show that it does not support the general proposition upon which petitioner relies.[5]

In the *Stonewall Cotton Mills* case the Circuit Court of Appeals for the Fifth Circuit at first upheld the view for which petitioner here contends, but on the Board's petition for rehearing, the court reversed, or at least seriously modified, its position, and held that the Board properly inferred that a discriminatory discharge had the effect of discouraging union membership despite the absence of any "positive evidence" that it had such effect (129 F. 2d, at 633). The only unmodi-

[5] In the *Air Associates* case the employer had discharged two employees whom, so far as the record showed, it thought to be nonunion men, telling them that it was obliged to do so in order to make room for two union officials who had been previously discharged; upon such facts, the court explained in the *Cities Service* case, it could discover no "rational basis for a conclusion that the discharge violated the Act; for an employer to tell men whom, so far as the record showed, he thought to be non-union men that they must be dismissed to make room for union men, would not necessarily tend to discourage union membership."

fied sentence which might support the claim of conflict relies exclusively upon the *Air Associates* case as authority.

Moreover, even if the claim of conflict were well founded, that would not call for review of the instant case. This Court will not as a rule review a decision which is in accord with the controlling decisions of this Court merely because of the "conflict" created by other lower court decisions which may have applied principles contrary to those announced by this Court.

3. Petitioner contends (Pet. 2, 8, 9–10, 13, 26–29) that the Board's order is "punitive rather than remedial" in so far as it requires petitioner to reinstate Babbitt if he applies within 40 days after his discharge from the armed forces.[9] Petitioner asserts that the reinstatement order should also contain certain other conditions and limitations upon the rights of veterans to reinstatement as provided in Section 8 (b) of the Selective Train-

[9] Since the advent of the war the Board has modified its normal reinstatement order so as to provide that discriminatorily discharged employees who are in the armed forces be reinstated if they apply within 40 days after their discharge from the services. National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1944), p. 42. The Board recently enlarged the period to 90 days following a similar amendment to the Selective Training and Service Act (P. L. 473, 78th Cong., December 8, 1944). *Matter of Federal Engineering Co., et al.*, decided February 14, 1945, 60 N. L. R. B., No. 112.

ing and Service Act (50 U. S. C. 308 (a), (b), (c)).[10] The contention is without merit.

The provisions as to the rights of veterans to reinstatement under the Selective Service Act have no necessary relation to the purposes and policies of the Labor Relations Act, which the Board's order is designed to effectuate. Section 10 (c) of the Act. Nor is there any inconsistency or conflict between these purposes and policies, requiring their accommodation to one another. Cf., *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31. The purpose of one is to grant honorably discharged veterans limited rights to reinstatement upon completion of their service in the armed forces; the purpose of the other is to protect the Nation's commerce against interruptions due to employer interferences with the rights of employees to be free from restraint and coercion in organizing for collective bargaining purposes. There is no reason why the fact that Babbitt has acquired certain rights to reinstatement under the Selective Service Act should affect the rights of petitioner's employees, including Babbitt, to full freedom of self-organ-

[10] These include the veteran's honorable discharge from the services, his continued qualification to perform the duties of the position, and the absence of change in the employer's circumstances so as to make reinstatement "impossible or unreasonable."

ization guaranteed in the Labor Relations Act. The Board has found that Babbitt's reinstatement as ordered by it is necessary to give effect to these latter rights (R. 62, 114). The fact that, as petitioner asserts (Pet. 29), Babbitt may be placed by the Board's order in a better position with respect to reinstatement than other veterans does not subtract from the propriety of the Board's order as a remedy for the unfair labor practices. The particular public interest sought to be effectuated by his reinstatement is not involved in the cases of the others, who have, moreover, not suffered the same illegal injury.

It should be noted further that the Board's order does not guarantee Babbitt reinstatement under any and all circumstances upon his discharge from the armed forces. In Babbitt's case, as in all discriminatory discharge cases, circumstances may change in such manner as to render it impossible or inequitable for petitioner to comply. Likewise, Babbitt, like any other person discriminatorily discharged, may so misconduct himself in the interval as to preclude his right to reinstatement. The Board does not attempt in its reinstatement orders to anticipate every contingency which may subsequently disqualify a discriminatorily discharged employee for reinstatement. Such contingencies are left to be dealt

with as and if they arise.[11] This is done in Babbitt's case.

The circuit courts of appeals have uniformly enforced Board orders containing provisions for reinstatement of veterans similar to those contained in the case at bar; none of them has questioned the propriety of the Board's failure to include in its order all of the conditions and limitations of the Selective Service Act. *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 140 F. (2d) 777, 779–780 (C. C. A. 5), enforcing 48 N. L. R. B. 1118, 1120, 1138; *National Labor Relations Board* v. *Gluek Brewing Co.,* 144 F. (2d) 847, 851 (C. C. A. 8), enforcing in this respect, 47 N. L. R. B. 1079, 1083; *National Labor Relations Board* v. *American Laundry Machine Co.,* 138 F. (2d) 889, 890 (C. C. A. 2), enforcing 45 N. L. R. B. 355, 359, 366–367.

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[11] E. g., in *Matter of Central Paint & Varnish Works*, case No. C–2136, the Board did not require the employer to comply with its reinstatement order as to one, Peter Vega, who, subsequent to the Board's order, pleaded guilty to petty larceny. Cf. Brief of the National Labor Relations Board in *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, No. 337, this Term, pp. 25–32.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1945.